

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of )

TELEPHONE COMPANY-CABLE )  
TELEVISION Cross-Ownership Rules, )  
Sections 63.54-63.58 )

CC Docket No. 87-266

and )

Amendments of Parts 32, 36, 61, )  
64, and 69 of the Commission's Rules to )  
Establish and Implement Regulatory )  
Procedures for Video Dialtone Service )

RM-8221

**COMMENTS OF U S WEST COMMUNICATIONS, INC.**

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## SUMMARY

The Third Further Notice in this proceeding seeks comment on possible regulatory responses to several video dialtone matters which are better left to the marketplace. In these comments, U S WEST provides the following information responsive to these issues.

First, the Third Further Notice requests information on two matters related to VDT capacity -- analog channel sharing and all digital systems. While opposing regulations which inhibit market developments in these areas, U S WEST describes in detail its own channel sharing plan and its vision of the future of all digital video dialtone.

Second, the Third Further Notice addresses the purchase of cable facilities by LECs in rural areas. U S WEST recommends that the rural exemption be increased well above its current 2,500 population limit, and that joint cable/telco construction be permitted in all instances.

Third, the Third Further Notice seeks comment on preferential access to video dialtone systems by various selected program providers. U S WEST contends that this proposal (already rejected once by the Commission) is a bad idea of dubious legality.

Fourth, the Third Further Notice asks whether pole or conduit rules are necessary to protect facilities-based programmers. As these programmers have

ample access to alternative delivery systems, such rules are unnecessary and would be unwise.

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**COMMENTS OF U S WEST COMMUNICATIONS, INC.**

U S WEST Communications, Inc. ("U S WEST"), through counsel hereby submits these Comments on the Third Further Notice of Proposed Rulemaking in the above-captioned docket.<sup>1</sup> The Third Further Notice seeks additional comments on video dialtone ("or VDT") capacity, preferred access, pole attachment and cable purchase issues.

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<sup>1</sup>See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, CC Docket No. 87-266, RM-8221, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269, rel. Nov. 7, 1994 ("Third Further Notice").

## I. INTRODUCTION

With all due respect, many aspects of the Third Further Notice illustrate a profound regulatory schizophrenia which may well serve to destroy, or at least materially impede, the development of the public benefits which video dialtone can provide. As the Federal Communications Commission ("Commission") agrees, video dialtone service does not enter the marketplace in a monopoly posture. Rather, video dialtone is a new service which holds the potential to break the existing monopoly of incumbent cable franchise holders in the market for distribution of multichannel video programming.<sup>2</sup> The Commission has also found that a common carrier video distribution model will offer the best opportunities for providing customer access to a wide variety of programming than the current cable franchisees choose to make available to the public.<sup>3</sup> Cable companies have no legal duty to carry programming provided by others.<sup>4</sup> Yet the Third Further Notice -- indeed the entire Memorandum Opinion and Order on Reconsideration -- treats video dialtone service planned by LECs as if they would be the monopoly, rather than the incumbent monopolist against whom video dialtone operations will need to compete.

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<sup>2</sup>See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, FCC 94-286, rel. Nov. 18, 1994, ¶ 2, n. 4, in which the Commission again confirmed the monopoly penetration of cable operators observing that new technologies have not yet reached market penetration levels necessary to contribute "effective competition" with cable operators.

<sup>3</sup>See Third Further Notice ¶ 31.

<sup>4</sup>See Chesapeake & Potomac Tel. Co. of Va. v. United States, No. 93-2340, slip op. at 14-16, 40-41 (4th Cir. Nov. 21, 1994). See also Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994).

In fact, the Third Further Notice, in attempting to further craft through regulatory fiat a perfect common carrier response to the existing cable monopolies, risks doing nothing more than further entrenching those existing monopolies. Consider how fatuous U S WEST would appear if it were to argue that new common carrier competitors such as Metropolitan Fiber Systems should be regulated much more heavily than is U S WEST itself -- on the theory that only through such regulation can a perfect competitor to U S WEST be fashioned. Yet such is precisely the regulatory structure now faced in the case of video dialtone, and exemplified by the questions raised in the Third Further Notice. Out of apparent fear that potential video dialtone providers might be too successful in competing with existing cable monopolies, the Commission seems prepared to impose an iron-clad regulatory fist on video dialtone providers. This approach contradicts the market and ultimately defies the concept of reasoned decision making.

In this regard, the Commission's lack of quick action to bring its rules into conformity with the cases striking down the statutory cable-telco cross-ownership ban is likewise telling.<sup>5</sup> The Commission is enjoined by order of a federal court from enforcing the cable cross-ownership statute against U S WEST.<sup>6</sup> Much of the video dialtone rules -- particularly those which restrict U S WEST's involvement in programming -- represent a Commission effort to construct a lawful competitive video service consistent with that statute, not a reasoned-public interest analysis. Were

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<sup>5</sup>See Third Further Notice ¶ 15.

<sup>6</sup>See U S WEST, Inc. v. U.S., 855 F. Supp. 1184 (W.D. Wash. 1994), appeal pending, No. 94-35775 (9th Cir.).

the Commission to rationally construct video dialtone rules in the absence of the statutory cross-ownership ban, video dialtone would be a fairly simple common carrier service -- probably subject to open network architecture and reasonable accounting procedures -- but nothing resembling the incredible mass of rules, controversies and conflicts which now surround video dialtone.<sup>7</sup> Yet, even though (with the demise of the cross-ownership statute) the basis for the complex set of rules has disappeared in the case of U S WEST (and four other Regional Bell Operating Companies ("RBOC")), the Commission has still evidenced a reluctance or unwillingness to grant programming authority to video dialtone providers in Section 214 authorization orders.<sup>8</sup> U S WEST and other RBOCs against whom the Commission is enjoined from enforcing the cross-ownership ban may today lawfully become cable franchisees, thus avoiding the hassle of the multitude of rules which the Commission has placed upon video dialtone providers. If such were to occur, U S WEST could avoid many of the issues such as channel allocation raised in the Third Further Notice -- in addition to other unwarranted rules mandated for VDT

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<sup>7</sup>In fact, U S WEST has always been of the opinion that neither the Commission's VDT rules or VDT orders were necessary to give LECs the authority to provide the equivalent of VDT service.

<sup>8</sup>See In the Matter of the Application of The Southern New England Telephone Company For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities to test a new technology for use in providing video dialtone service in a specific area in Connecticut, File No. W-P-C-6858, Order and Authorization, FCC 93-473, rel Nov. 12, 1993. See also In the Matter of the Application of New Jersey Bell Telephone Company For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within a geographically defined area in Dover Township, Ocean County, New Jersey, Order and Authorization, 9 FCC Rcd. 3677 (1994), appeals pending sub nom. Adelphia Communications Corp. v. FCC, No. 94-1616 (D.C. Cir. pet. for rev. filed Sep. 7, 1994.



service. If such were to happen, the Commission's vision of a common carrier video dialtone service could be seriously weakened, if not destroyed altogether.

If the Commission really wants to foster development of a viable common carrier alternative to the existing cable monopolies, it should retreat from the unsupportable proposition that the nascent video dialtone industry, with no customers to speak of, is a monopoly. Issues of channel allocation, channel sharing, digital networks and the like can work themselves out in the marketplace. The Commission's regulatory thrust in these areas is entirely misplaced and seriously counterproductive.

## II. CAPACITY ISSUES

### A. Introduction

The Third Further Notice poses a series of questions on how rules might be devised to deal with issues arising from the fact that channel capacity on a VDT system will be inherently limited, at least so long as analog transmission remains an important part of VDT. These questions deal primarily with the development of digital video dialtone systems<sup>9</sup> and analog channel sharing arrangements.<sup>10</sup> The focus of these inquiries ultimately devolves to compulsory regulatory action in the video dialtone market to displace natural market forces. In the area of digital

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<sup>9</sup>See Third Further Notice ¶¶ 269-270.

<sup>10</sup>See id. ¶¶ 271-275.

systems, the Third Further Notice ultimately poses the question of whether the Commission “should require LECs [local exchange carriers] to employ all-digital video dialtone systems.”<sup>11</sup> In the area of capacity sharing, the Third Further Notice, while expressly disclaiming any intention “to prescribe one kind of sharing arrangement,” nevertheless looks to establish “rules and policies that will ensure that any such arrangement will further the public interest . . .”<sup>12</sup> Certain types of channel allocation (e.g., “anchor tenant” proposals) are simply rejected out of hand because they are “inconsistent with the common carrier model for video dialtone . . .”<sup>13</sup>

#### B. Channel Sharing

As noted, U S WEST believes that rules for channel sharing are unnecessary and counterproductive. There is no good reason why a video dialtone carrier should not be permitted to work with its customers to devise its own channel sharing plan without regulatory interference -- at least unless the process breaks down and Commission assistance is sought. For the record, U S WEST's proposed analog channel sharing practices are described herein.<sup>14</sup>

U S WEST proposes that, rather than sharing only a portion of the 77 analog channels and allocating the remainder among multiple providers, the entire com-

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<sup>11</sup>Id. ¶ 270.

<sup>12</sup>Id. ¶ 275.

<sup>13</sup>Id. ¶ 35.

<sup>14</sup>This discussion deals with sharing proposals in U S WEST's Section 214 proposals for Denver and all subsequent applications. The U S WEST Omaha channel sharing proposal is slightly different.

plement of 77 channels be shared and made available to any video information provider ("VIP") interested in delivering analog-based content to end users.

Channels 2-13 will not have interdiction capability and will be delivered to all end-user subscribers. Channels 14-77 will have interdiction capability, allowing the VIP to select which programming is delivered to their end-user subscribers.

At a given point in time, on a per city basis (based on processing of Section 214 applications), U S WEST will announce the opportunity for interested VIPs to submit requests for analog channels. Notification or announcement will be made publicly (through the local media, as well as via written notification to any VIP who has contacted U S WEST and expressed an interest in analog VDT), and will provide a time frame during which written requests will be accepted. The timing for analog channel public notification and request submission will be based on dates of availability of basic video dialtone service per city.

Following notification, written requests will be accepted during the specified period of time. At the end of the specified period, a facilitated meeting will be held. Processes and rules for decision making will be defined in the initial meeting, by the VIPs themselves. The types of processes and rules may include how decisions will be made (e.g., lottery, majority vote). U S WEST will supply unaffiliated, trained facilitation experts to lead the sessions. During facilitation, all VIPs will decide what programming will appear on the 77 analog channels, in what order channels will appear within the channel line-up, and which companies will purchase and be billed for the analog gateway connections to deliver programming from

the VIPs to the Basic VDT ("BVDT") gateway. If the providers are unable to agree upon programming content and/or line-up for all 77 analog channels based on their facilitated process rules, the channels that are not agreed upon will have no programming assigned.

Each VIP provider will be able to deliver to its end users any of the 77 channels for which it has "programming rights" to deliver. Following the facilitation process, each VIP who intends to purchase BVDT services will be required to submit proof that it has acquired "rights or permission" to deliver the programming it intends to deliver to its end-user subscribers. The interdiction capability on channels 13-77 will give VIPs the ability to create their own packages (a la carte) utilizing programming available on the 77 analog channels to deliver to end users.

U S WEST will grant appropriate time, prior to commencement of analog services connections, for VIPs to secure rights to deliver their chosen programming content.

U S WEST will work with the companies designated by the VIPs through the facilitation process to provide analog gateway connections. Based on a facilitated agreement, U S WEST will provide either a single bill to one VIP designated by the group, or prorate the analog gateway connection charge among multiple providers if so requested.

U S WEST will annually re-release public notification and hold a facilitated meeting with all VIPs who utilize the 77 analog channels to reassess the programming, channel line-up and gateway connection VIPs. Included during the annual facilitation will be any new entrants who request analog capacity after the

previous designated entry time frame had closed. Changes will be implemented annually, based on the results of the annual facilitation process. Those changes will be submitted to U S WEST by the facilitator, in writing, and implemented within 45 days of receipt of the written request.

This process has the advantage of maximizing the ability of VIPs to access customers over U S WEST's video dialtone systems in an analog mode. This advantage is highly important because VIPs, at least until they have been rejected by the non-common carrier cable operator monopolist, will be able to choose an alternate delivery system to U S WEST's video dialtone. As the new operator with zero market share entering into markets dominated by incumbent monopolies, it is very much in U S WEST's interest to offer a product which attracts customers. However, the U S WEST plan should not become a rule -- other video dialtone providers presumably face similar market challenges against entrenched monopolies, and should be permitted to develop their own responses to meet their own needs.

C. All Digital Network

The Third Further Notice poses a variety of questions concerning possible evolution of an all digital video dialtone network, with an emphasis on whether the Commission should actually require such deployment.<sup>15</sup> We emphasize here that the Commission would be without authority to impose any such requirement -- at the very least without following the procedures and making the findings required

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<sup>15</sup>See Third Further Notice ¶ 270.

under Section 214(d) of the Communications Act. Given the fact that video dialtone is proposed to compete with an existing cable monopoly, such findings cannot possibly be made. We suggest that the Commission abandon the line of inquiry focusing on coercing LECs to deploy all digital video dialtone networks.

This said, U S WEST agrees that an all digital video dialtone network ("ADN") is desirable from a market, technological and consumer perspective. The long-term efficiencies of such a network and the availability of a broad array of both programming and programmers will be served by having an all digital solution. In the near and intermediate term, however, an ADN is expensive (for both the network operator and the video information provider VIP and could present some significant problems for end users.

The use of digital compression for transmitting single viewer interactive programming (e.g., personal home shopping, an interactive game or personal home banking) is seen as today's best solution for individual interactive services. Broadcast basic and pay cable services ("B&P") are carried today as analog signals on cable and over-the-air broadcast networks. The cable networks that carry these services today typically operate in frequencies up to 650 Mhz. Some advanced systems operate up to 750 Mhz, while experimental systems can operate as high as 1 Ghz in total bandwidth.

1. Elements of ADN

An ADN would require the following elements not present in the analog world:

(a) **Digital compression equipment** in either the Level 1 (basic) or Level 2 (enhanced) VDT headends. This equipment must be built on a per channel basis, i.e., one compression unit will be required for each analog channel to be compressed. The signal would be received as a standard analog stream, probably in a baseband signal, digitized and then compressed using a standard compression technique (e.g., MPEG II). The system would deliver baseband compressed digital video.

(b) **Multi-modulating equipment** in Level 1. This equipment will take the individual compressed streams presented as baseband data and modulate more than one stream onto a single 6 Mhz frequency slot. The number of channels to be carried on a single frequency slot will be limited by the data rate of the composite streams. Using one popular method of modulation (QAM 64) 27 Mbps of capacity exists per 6 Mhz slot.

(c) **Demodulating equipment** in either the Level 1 network or the equipment on the end user's customer's premises ("CPE"). This equipment will allow the individual customer to tune to a specific virtual channel that contains the programming ordered. This function is the reverse of the multi-modulating process.

(d) **Digital decompression equipment** in either the Level 1 network or the end-user CPE. This equipment decompresses the digital bit stream, recomposes

the video signal and converts it to analog NTSC (or other) signals that can be read by a customer's TV set.

## 2. Costs of ADN Equipment

Digital compression equipment is available today for MPEG II compression and will be available in limited quantities after the second quarter of 1995 for MPEG II compression. MPEG II is the standard most often referenced when discussing ADN.

Initial costs for MPEG II real-time compression systems in 1995 will be \$70,000 and up. This amount will include compression for a single digital channel. Depending on the manufacturer, some limited modulation equipment may be included in the devices. This cost is expected to decline as the equipment becomes more widely manufactured.

Current costs for QAM modulator equipment is \$60,000 for a unit that demultiplexes streams carried on one OC-3 signal and modulates them onto 56 Mhz channels using 64 QAM modulation.

Demodulation is currently viewed as a set-top box (or "STB") function (end-user CPE), although some viable architectures accomplish this task in the network.

Decompression equipment is primarily confined to MPEG II decompression chips that are already in mass production. Chips are available at this time in the \$50-75 range depending on total functionality provided and quantity ordered.



### 3. Technical Feasibility and Image Quality

The building of the necessary equipment is feasible in the near and long terms. Versions of the equipment are employed today in experimental projects and in deployed products (e.g., RCA direct broadcast satellite receivers). The integration of this equipment into a single, mass-producible system has not occurred. Ongoing systems integration in residential digital networks will ultimately bring down the overall cost and increase the reliability of the systems.

The quality of the video produced by such systems is very good. Most customers who have been shown early versions of this technology comment that the video is better than the TV they receive today over traditional cable TV networks. Quality is directly related to several operator controlled variables including compression rate, resolution rate, use and frequency of various compression algorithm components (e.g., use of B Frames and frequency of I Frames). Moreover, the source material that has been used to date in lower bit rates (less than 4 Mbps) has been from films -- movie compression can be more greatly controlled in the compression process, and the starting quality of the image is superior to broadcast TV.

For image quality to be good when the source material is broadcast TV, the system must employ higher bit rates for compression. Initial studies and deployments of MPEG II compressed materials indicate that bit rates in excess of 8 Mbps must be used to provide adequate quality. For live sporting events, this rate may be higher. The higher bit rate means that fewer channels may be multimodulated

onto a single 6 Mhz frequency slot. The fewer the channels per 6 Mhz, the higher the cost per virtual channel.

For comparison, it is believed that as many as seven virtual channels of movies could be modulated onto a single 6 Mhz slot (using 64 QAM and a 4 Mbps compression rate), while only three broadcast TV channels could be modulated into the same frequency (using 64 QAM at an 8 Mbps compression rate).

Compressed digital video quality is dependent upon several factors and is difficult to quantify since video quality is generally subjective in nature. U S WEST has been quite impressed with the current quality of real time encoded video. Quality for real time encoded MPEG II video is dependent upon such factors as program content (motion and scene complexity), program source material, use of prefiltering algorithms, and the selection of numerous variables which are options within the MPEG II Main Level/Main Profile standard such as: resolution (SIF or CCIR 601), pixel size, I Frame repetition rate, use of concealment motion vectors, GOP structure selection (I, I,P or I,B,P Frame structures) and, most importantly, the data rate per channel. U S WEST believes that compressed digital video will offer substantially improved video quality to that of existing broadcast analog programs provided on cable systems, over the air, or via video cassettes. Video quality will depend largely upon the selected parameters which translates into specific data rates for various types of program content. For example, typical off air or broadcast cable channels may offer perfectly acceptable quality at 4 to 6 Mb/s per channel; sporting events, however, may require 6 to 10 Mb/s per channel depending

upon the nature of the actual event itself. U S WEST is currently developing ways to predetermine data rate selection for program encoders and allocation schemes for data rates on a channel-by-channel or movie-by-movie basis to assess overall network capacity and traffic engineering implications.

#### 4. Cost

The following network elements represent areas of concern for new technologies and their associated costs:

(a) **Real Time Encoders:** Current pricing for real time encoders (single unit purchase) is around \$100,000 per channel. These prices are expected to drop within the range of \$20,000 to \$40,000 per channel with volume and time. These devices are ultimately shared by a very large customer base and their pricing, therefore, will be relatively small compared to items placed much closer to the subscriber. In addition, U S WEST believes that many future programs will be delivered via satellites in a digital (MPEG II transport stream) format, thereby reducing the actual encoding costs incurred by Level 1.

(b) **Access Network:** Access network costs are proportionally related to the capabilities and anticipated penetration rates assumed for a vast array of telecommunications service types. U S WEST has received volume pricing for our proposed access architecture and believes that our solution is at parity with HFC architectures (less than \$1,000 per house passed), and is actually less sensitive to

cost increases as a function of increased VDT subscriber penetrations than are such architectures.

(c) **Set Top Boxes:** Set top boxes are likely the most critical technological cost barrier to successful VDT implementation. As the LECs look to migrate away from broadcast analog facilities in favor of more cost effective, more robust, and higher performance digital solutions, the associated impact on the end-user CPE becomes the most cost sensitive network component. STB costs vary as a function of capabilities and their associated CPU processing power and memory requirements. U S WEST believes that a digital STB with the equivalent capabilities of current high-end CATV addressable converters will drop in price to the \$280-300 range. Additional navigational/menuing capabilities or support for other services such as digital music or digital games will increase this cost accordingly. Current estimates for the high end digital STBs that U S WEST plans to offer begin in the \$500-700 range (1995) and are expected to fall within the \$300-400 range by 1998. As with the access network elements, there may be opportunities to solicit forward pricing schemes from suppliers if large volume commitments can be made.

In the future, U S WEST believes that an all digital solution is inevitable, in which case STBs may be required on every set in the home. In this scenario, a cost/functionality reduced STB may be utilized for secondary TVs/VCRs within the home at a price that is believed to fall below \$200.

## 5. Operational Issues

Many operational issues confront the delivery of compressed digital video channels and the associated interaction with analog channels including the following:

(a) **Channel surfing delay:** The ability to channel surf digital systems is dependent upon two important factors: (1) the type of access architecture selected; and (2) the selection of the GOP structure, I Frame, repetition rate, and subsequent channel data rate. A switched digital fiber to the curb ("FTTC") platform has the ability to facilitate more rapid channel selection for broadcast services. The dominant contribution to channel changing delay is the associated time it takes to buffer and decode a MPEG II video stream in the STB. This decoding function, and its associated channel change delay, is contingent upon the selection of various MPEG II variables at the encoding stage. As mentioned before, the decision to use I Frames with or without P Frames and B Frames strongly influences the time in which an MPEG II channel can be synchronized and subsequently displayed on the TV screen. The most crucial parameter is the search time necessary to find an I Frame. If P and/or B Frames are used, additional time is required for buffering the B and P Frames so that the information can be correlated to the I Frame. For example, a GOP structure containing I, B and P Frames where I Frames occur twice every second will require anywhere from 167 to 667 ms to decode a movie encoded at 6 Mb/s. The same movie encoded with 7.5 I Frames per second will require 8.3 Mb/s of bandwidth. However, the associated channel change delay is

reduced to the range of 120 to 253 ms with this coding. The U S WEST human factors organization believes that a user will require channel changing delays of 400 ms or less. This may be augmented by the use of audible or visual queues to inform the user that his/her channel change request was indeed recognized and would prohibit them from hitting the up/down button a second time. U S WEST will evaluate user reaction to digital channel changing times once a laboratory system is set up.

(b) **Transition from analog to digital channel selection:** Aside from the pure MPEG II decoding delays mentioned above, additional complexity and some minimal additional channel changing time will be required to allow a user to seamlessly “surf” from a broadcast analog channel to a broadcast digital channel due to the way in which analog and digital channels are selected by the STB. Analog channels require selection of a specific RF carrier frequency, whereby the associated NTSC channel can be demodulated and remodulated onto a particular RF output (typically channel 3 or 4). Digital channels must also be tuned, if carried via QAM or VSB modulation schemes (those used in HFC architectures), or simply de-multiplexed from a composite baseband digital bit stream as proposed in the U S WEST deployment architecture. Both schemes require some form of intelligence within the STB to enable this transition to occur. While the associated time increment may not be significant, the STB may be impacted by increased memory or CPU processing capabilities to facilitate this transition. U S WEST is currently working with suppliers to determine what these impacts are.

### III. ACQUISITION OF CABLE FACILITIES

The video dialtone rules currently prohibit a “telephone company” from “acquir[ing] cable facilities in its local exchange service areas for use in providing video dialtone service, or services related to the provision of video programming directly to subscribers.”<sup>16</sup> The purpose of this prohibition is to “benefit the public by promoting greater competition in the delivery of video services, increasing the diversity of video programming, and advancing the national communications infrastructure.”<sup>17</sup> The Third Further Notice seeks comment on how to establish procedures so that this prohibition would not prevent such purchases when the Commission’s goal of increased competition would not be inhibited thereby.<sup>18</sup> It is proposed that any proposal to seek authority to purchase cable facilities for VDT purposes be disclosed in the VDT Section 214 application.<sup>19</sup> Several matters deserve analysis.

First, the Commission’s observation that overly rigorous adherence to the prohibition against a LEC purchasing cable facilities for VDT purposes may needlessly deprive rural citizens of the benefits of new technology is accurate. Indeed, it is quite likely that, in a number of geographic areas, the investment necessary to deliver the types of services which VDT (or advanced cable service) envisions might

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<sup>16</sup>47 CFR § 63.54(d)(5).

<sup>17</sup>Third Further Notice ¶ 48.

<sup>18</sup>See id. ¶¶ 276-281.

<sup>19</sup>Id. ¶ 278.

not be economical even if cable facilities could be purchased for the provision of VDT. The rural exemption to the cross-ownership rules, which would already permit the type of purchase envisioned here, is currently applicable only to areas of less than 2,500 population.<sup>20</sup> The pending rulemaking on the rural exemption would increase the population number to only 10,000.<sup>21</sup> This number is too small to cover the need which the exception is designed to meet. As an initial step, the population area covered by that rural exemption should be increased significantly.

Second, as is the case with the channel capacity issues discussed above, the Commission must be cautious not to destroy or diminish through unnecessary regulation the marketplace benefits which VDT can provide to the public. If a LEC purchase of cable facilities for video dialtone purposes could really impede competition (actual or potential), the antitrust laws are well suited to deal with that problem.<sup>22</sup> A cumbersome process which would require preapproval of all such purchases as part of a Section 214 authorization approval for the VDT system construction itself would be a mistake. For areas covered by the rural exemption, no prior approval should be necessary. For larger areas, a better solution would be to make a LEC purchaser of cable facilities subject to approval by the Commission

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<sup>20</sup>47 CFR § 63.58(a).

<sup>21</sup>See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781, 5855-57 ¶¶ 150-54 (1992), appeals pending sub nom. Mankato Citizens Telephone Company, et al. v. FCC, Nos. 92-1404, et al. (D.C. Cir. Sep. 9, 1992) ("Second Report and Order").

<sup>22</sup>See Federal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (May 5, 1992).



after public notice, but apart from the Section 214 process itself. The public (or at least NCTA) can be counted on to bring all relevant (as well as irrelevant) matters to the attention of the Commission following such notice, and the Commission can decide the purchase issues without impeding the LEC's ability to pursue the rest of its VDT construction.

Finally, the Third Further Notice seeks comment on joint construction of cable and VDT facilities "in areas in which the acquisition ban is lifted."<sup>23</sup> This notion is sensible but too limited. There is no good reason to prohibit such joint construction in any location -- whether or not the "acquisition" ban applies to that area. Joint construction which prevents serious diseconomies (e.g., joint trenching, etc.) clearly should not be prohibited, nor should other joint construction which does not impede independence of operations. The Commission also has ample experience with joint facilities sharing in another context -- generally referred to as infeasible rights of user (or "IRU").<sup>24</sup> The basic IRU analysis could be applied to joint telco/cable construction. There is no reason to prohibit a cable company and/or a LEC, on a voluntary basis, from entering into a contract for joint construction of facilities if such is truly economical for both parties, so long as both companies then operate their independent business over those facilities without collusion. There is no reason to expect that such transactions would not be arms-length ones, and every reason to anticipate that the public would benefit thereby. Thus, U S WEST

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<sup>23</sup>Third Further Notice ¶ 279.

<sup>24</sup>See ITT Cable & Radio Inc.-Puerto Rico, et al., 11 FCC 2d 781, 783 (1968); A.T.&T. et al., 13 FCC 2d 235 (1968); Communication Satellites, 23 FCC 2d 9, 16 (1970).